

ENDANGERED SPECIES ACT WORKSHOP SUMMARY REPORT
NATIONAL MARINE FISHERIES SERVICE

APPENDIX A

RESPONSES TO KEY ISSUES IDENTIFIED AT THE 4(D) RULE WORKSHOPS
MAY 2001

The National Marine Fisheries Service (NMFS) conducted a series of 19 Endangered Species Act (ESA) workshops in Washington and Oregon from September to November, 2000 and identified a number of issues of importance to workshop participants. This appendix is part of the salmon recovery workshops *Feedback Report*. The following issues and responses are important as local jurisdictions, state agencies, and individuals respond to the NMFS 4(d) rule for Pacific salmon (65 FR 42422). These topics will evolve as new science and technical information becomes available and as the 4(d) rule is implemented. This Appendix is likely to be refined over time as needed.

PROPERLY FUNCTIONING CONDITION (PFC):

How does NMFS define PFC? PFC is the unifying conservation standard for the habitat affecting activities addressed in the 4(d) rule. NMFS defines PFC as “the sustained presence of natural habitat-forming processes that are necessary for the long-term survival of threatened salmon and steelhead through the full range of environmental variation.” Actions that affect salmon habitat may not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. NMFS has produced two documents: *The Habitat Approach*, that defines PFC; and *Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Watershed Scale*, that provides a consistent, geographically adaptable framework for making effect determinations. NMFS applies the PFC habitat standard in all ESA sections, whether carrying out ESA section 7(a)(2) consultations to evaluate the effects of an action on salmon habitat or evaluating a permit request under section 10. In administering 4(d) rule Limit No. 12, NMFS will use the 12 evaluation considerations to evaluate proposed programs to ensure they contribute to the attainment and maintenance of PFC in salmon habitat. For more information on PFC refer to the NMFS web page at www.nwr.noaa.gov.

ENDANGERED SPECIES ACT (ESA):

How does the ESA relate to other state and Federal requirements, such as state water law?

The ESA was enacted by Congress in 1973 to protect and recover species in danger of going extinct, or likely to become so. Under section 7 of the ESA, no Federal agency may fund, permit, or carry out an activity that is likely to jeopardize the continued existence of threatened or endangered species. This obligation upon Federal agencies alone will not be enough to recover threatened salmon. The 4(d) rule prohibits actions by all people and entities (including federal,

state, and local governments) that “take” (which includes kill, capture, harm, and harass) listed threatened salmonids, unless NMFS has qualified the state or local regulations that govern those actions, using the standards and requirements of the 4(d) rule. Federal agencies must consult with NMFS to ensure their actions (or the activities they fund or permit) do not jeopardize threatened species. There is no corresponding ESA requirement that state governments consult with NMFS. However, the 4(d) rule take prohibitions do apply to state authorized or permitted activities. Local jurisdictions, individuals and state- permitted practices may incur ESA penalties. For example, a state water withdrawal permit that results in take of threatened species could leave the permitting agency open to prosecution under the ESA. NMFS is actively working with selected state and Federal agencies to review and modify programs, consult on proposed actions, and provide technical assistance to conserve threatened species.

VIALE SALMONID POPULATIONS (VSP):

How does NMFS define VSP and use it? NMFS defines a viable salmonid population (VSP) as an independent population of any Pacific salmonid (genus *Oncorhynchus*) that has a negligible risk of extinction (over a 100-year time frame) due to threats from demographic variation, local environmental variation, and genetic diversity changes. Population viability thresholds are determined using the parameters of abundance, productivity, spatial distribution, and diversity. NMFS uses the concept of VSP in evaluating hatchery and harvest activities or other activities that directly affect populations. We also use it to identify de-listing goals for listed evolutionarily significant units (ESUs). Population abundance can vary due to genetic, environmental, and demographic factors. In applying the VSP concept NMFS relies on two thresholds of population status: (1) a critical population threshold, and (2) a viable population threshold. The critical threshold is a level below which a population’s risk of extinction increases quickly in response to risks. The viable threshold is a condition where the population is self-sustaining and not likely to go extinct in the foreseeable future. Final viability thresholds will be determined in the recovery planning process, though interim thresholds will be used until recovery plans are in place.

For more information on the viable salmonid population concept, see “*A Citizen’s Guide to the 4(d) Rule for Threatened Salmon and Steelhead on the West Coast*” - available on the Internet at <http://www.nwr.noaa.gov/1salmon/salmesa/final4d.htm>, or see “Viable Salmonid Populations and the Recovery of Evolutionarily Significant Units,” which is also available on the Internet at <http://www.nwfsc.noaa.gov/pubs/tm/tm42/tm42.pdf>.

FOREST PRACTICES:

Are there parts of the Oregon Forest Practices Act that NMFS has determined are deficient with regard to PFC? Has NMFS communicated its assessment to the Oregon Department of Forestry? NMFS has worked closely with the State of Oregon since 1996 on various aspects of the Oregon Plan, including forest practices. In 1998, NMFS submitted a draft proposal to the state’s Forest Practices Advisory Committee recommending changes in Oregon forest practices.

In the draft proposal, NMFS identified problems and recommended improvements in a number of areas including: riparian management; identification and protection of unstable sites; road construction, maintenance, use and retirement; identification and management of cumulative effects; and fish passage. NMFS has also commented on products from the most recent Forest Practices Advisory Committee that the Board of Forestry will consider over the next two to four years. Most recently, NMFS reviewed the December, 2000, draft report ***ODF/DEQ Sufficiency Analysis: Stream Temperature***. The result was a February 28, 2001, letter jointly signed by NMFS, the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency. It concluded that Oregon forest practices do not adequately protect stream shade and large wood recruitment, do not adequately address sediment problems resulting from roads and management-induced landslides, and do not identify and control landscape-scale effects on water temperature.

ENFORCEMENT:

What are the primary targets for NMFS enforcement and who enforces civil and criminal penalties? The Take Guidance section in the ***Federal Register*** preamble to the 4(d) rule identifies the 16 categories of activities most likely to cause take and thus violate the section 9 take prohibition. As stated in the rule, these activities will be NMFS' enforcement priorities. The NMFS Office for Law Enforcement investigates all alleged violations of the ESA. Special Agents, working with the National Oceanic and Atmospheric Administration (NOAA) and Department of Justice attorneys weigh the gravity of the offense when determining whether to proceed with a civil or criminal action. Civil penalties are assessed by NOAA. Criminal penalties are sought by the U.S. Department of Justice. When an injunction appears to be the most effective course of action to stop an activity causing take, the NMFS Enforcement Office, NOAA General Counsel, and the Department of Justice work together to bring it about.

4(D) RULES FOR SALMON AND STEELHEAD:

What if the 4(d) rule does not protect threatened salmon and steelhead? NMFS is confident the 4(d) rule will protect threatened salmon and steelhead. The 4(d) rule prohibits take in 14 threatened salmon and steelhead ESUs and it includes 13 limits that are consistent with the conservation of these ESUs. Each authorized limit will require monitoring and evaluation to ensure the species are protected. In addition, the rule is only one of several tools NMFS uses to conserve threatened populations. The others are: section 7 consultation, section 10 permits, and section 4(f) recovery plans. Section 7 was discussed earlier. Section 10 permits for incidental take are available to non-Federal parties when they have written a comprehensive habitat conservation plan (HCP) identifying impacts on listed species and how they will be avoided, minimized, and mitigated. In any case, NMFS will monitor and evaluate the effectiveness of the different programs it authorizes under the 4(d) rule to ensure they are consistent with respect to conserving listed species.

What is the status of lawsuits that are challenging NMFS' authority to promulgate the 4(d) rules? What happens if the 4(d) rule is struck down? Two lawsuits have been filed against NMFS challenging different parts the 4(d) rule. The first lawsuit was filed in federal court in Seattle by the Washington Environmental Council and six other environmental and fishing groups, and it asks the court to find that Limit No. 12 (regarding development and redevelopment activities) and Limit No. 13 (Washington forestry activities) do not support conservation of listed salmon and steelhead, and that the ***Fish and Forest Report*** upon which Limit 13 was largely based did not use the best available science when developing forest practices standards. The suit also alleges that NMFS failed to prepare an environmental impact statement assessing limits as required by the National Environmental Policy Act (NEPA). This lawsuit is expected to be decided by the end of 2001. The second lawsuit was filed in federal court in Washington, D.C. by Kittitas County in Washington State and the National Association of Home Builders and targets Limit 12. It alleges that the rule is not "necessary and advisable" for the recovery of the threatened species, that it violates the 5th and 10th amendments of the Constitution, and that NMFS did not comply with the Regulatory and Flexibility Act (RFA). NMFS is confident that the 4(d) rule will survive these legal challenges. Further, as the rule states, the limits are severable, meaning that if one limit were affected by a court ruling, the others would remain in effect while NMFS made any necessary amendments.

What is NMFS' capacity to implement the 4(d) rule? NMFS is developing internal administrative processes and training staff to efficiently review and decide on 4(d) rule limit submittals. NMFS is also seeking additional Federal money to increase staff in response to the demands of the 4(d) rule and other ESA administrative issues.

Is the City of Portland the only jurisdiction that can use 4(d) rule Limit No. 11 for integrated pest management? Yes, Limit No. 11 applies specifically to the City of Portland Parks and Recreation Department (PP&R) and is not available to other jurisdictions. PP&R's integrated pest management program received a limit because it could be described in detail and was clearly a conservation program. NMFS' decision process was based on careful scientific review of the program. NMFS concluded that Portland's plan addresses potential impacts and protects listed salmonids, but is too unique to serve as a useful model for most pesticide applications. A subsequent review process will be conducted one year after Portland's plan is adopted, additional reviews will occur every two years, and appropriate adjustments will be made throughout the process.

Will there be future amendments to the 4(d) rule and will there be any liability for actions taking place before new amendments are adopted? As stated in NMFS' ***4(d) Rule Implementation Binder*** (September, 2000), the only currently available 4(d) limits are the 13 described in the final rule and in the ***Binder***. NMFS is confident that as more large-scale conservation solutions are found, these efforts will be recognized in future rulemaking. The amendment process, however, is a lengthy one involving publication of the proposed amendment in the ***Federal Register***, analysis of the comments received, NEPA and RFA analyses, consultation with the U.S. Fish and Wildlife Service, and other steps. While more 4(d) limits will be developed in the future, NMFS cautions interested parties that this is a very time

consuming process. In the meantime, NMFS recommends that jurisdictions, businesses, and individuals evaluate their activities to determine the likelihood of take occurring and modify their practices to reduce impacts on habitat or threatened fish. If an activity is likely to take listed species, the responsible party should contact NMFS staff to identify permit options or other actions to reduce potential liabilities. Refer to the **4(d) Rule Implementation Binder** for the names of NMFS staff members to contact with questions regarding the impacts of current practices.

Does NMFS have an expedited process to get a limit for small sites and small populations of fish? That is, does NMFS have a mechanism similar to U.S. Fish and Wildlife Service's (USFWS') habitat conservation plans for small woodlot owners regarding the spotted owl?

No. NMFS tailors its section 10 habitat conservation plan (HCP) requirements to the scope of individual proposed actions, and has not formally adopted an expedited process similar to the USFWS. NMFS' 4(d) rule for salmon and steelhead differs from USFWS 4(d) rules in that NMFS' rule contains 13 limits on the take prohibition, while the USFWS' general 4(d) rule applies an across-the-board take prohibition automatically upon listing threatened species (e.g., bull trout). It is NMFS' goal that the process for qualifying programs under a 4(d) limit be efficient and timely. Interested parties should study the **4(d) Rule Implementation Binder** closely, and then contact the appropriate NMFS staff person to ensure that a 4(d) limit submittal is consistent with the guidance and so may be processed in a timely manner.

Are there any model ordinances that city and county staff can use to assist them in putting together a 4(d) submittal for Limit No. 12? When plans are approved under the 4(d) rule, will they be made available to others, and if so, how? What if a city or county does not already have ordinances in place?

At this time, NMFS has not authorized any city, county or regional government ordinances or codes qualifying under Limit No. 12. However, there are several jurisdictions in Washington and Oregon that are working with NMFS to develop municipal, residential, commercial, and industrial (MRCI) submittal packages. Workshop participants expressed a strong interest in having examples of codes and ordinances, and as soon as ordinances or codes are qualified for Limit No. 12, NMFS will post their availability on its web page. If a jurisdiction does not have ordinances or codes that address development impacts on threatened species, it should identify what development activities occur in their jurisdiction and evaluate whether any aspect of these activities may impact these species or their habitat. The jurisdiction should then use this assessment to determine if there are any potential ESA take liabilities associated with the activities. If potential ESA liabilities exist, the responsible party should identify how to modify the activities or adopt appropriate code to reduce the likelihood of take, or contact NMFS staff to identify appropriate ESA permit options.

Does the 4(d) rule affect individuals? The 4(d) rule protects 14 ESUs of salmon and steelhead in Idaho, Washington, Oregon, and California by prohibiting take of these species. It applies to ocean and inland areas, and to any authority, agency, or private individual subject to U.S. jurisdiction (including federal agencies and employees). Activities or development not likely to kill or harm protected species will not be affected by the rule. The rule does not prohibit actions or programs, it prohibits illegal take.

How can local jurisdictions plan their programs to address the ESA when the science is still evolving? During the last 10 years, the scientific community's knowledge and understanding about habitat-forming processes, the importance of properly functioning condition, and the myriad impacts of human activities on salmon habitat have significantly increased. Our scientific knowledge will evolve over time. Even though new information will become available in the future, we know enough today about what fish need to survive and how to reduce or eliminate human impacts that action can be taken to conserve threatened fish. The 4(d) rule takes into account the fact that science will evolve and that we will learn more about programs authorized under 4(d) limits as monitoring data is collected from these projects. The 4(d) rule has an adaptive management component to address this issue. Through it, NMFS can request that programs within certain limits be modified in response to new information.

Are there funds available to assist local jurisdictions to prepare ordinances for submittal in the 4(d) rule? Currently, NMFS does not have funding to help local jurisdictions prepare ordinances and planning code that respond to the 4(d) rule. NMFS prepared a summary table of funding sources and distributed it at the 4(d) workshops. The summary presents a partial list of private and federal funding sources for non-point source pollution control that may also be used to support activities that aid salmon recovery and planning efforts. A copy of the funding table is available in the 4(d) rule section of the NMFS web site at www.nwr.noaa.gov. In addition, local jurisdictions may want to contact national and statewide professional associations for technical assistance and funding.

AGRICULTURE PRACTICES:

How do agricultural programs fit into recovery? Is Oregon Senate Bill 1010 sufficient to meet PFC or recovery goals? Has NMFS been negotiating with the Oregon Department of Agriculture on pesticide and herbicide practices? Agricultural practices are one of many categories of human activities that affect salmon habitat across the landscape, and as such, they will be addressed in the recovery planning process. Agricultural programs that support PFC will be an important component of recovery planning. Oregon's Senate Bill 1010 program addresses state water quality goals and is implemented at the local level. However, no Senate Bill 1010 planning committee has ever identified salmon recovery as a goal. Therefore, individual farmers and ranchers must evaluate their practices and if needed, modify them to ensure that their activities do not kill or injure threatened salmonids. NMFS is working on several agricultural initiatives in Washington and Oregon to identify conservation practices that might contribute to salmon and habitat conservation. The use of pesticides and herbicides relates to both agricultural practices and urban settings. As stated in the 4(d) rule preamble's Take Guidance section, NMFS will work with the EPA through the section 7 consultation process to develop appropriate restrictions on pesticide and herbicide use, and thereby provide the best possible guidance to all users. NMFS is currently not in negotiation with the Oregon Department of Agriculture regarding pesticide or herbicide practices.

MARINE MAMMALS:

What is the impact of marine mammal predation on threatened salmon and steelhead?

Salmon predators like sea lions and terns have co-evolved with salmon and steelhead and, while they do kill them, are not considered a major factor in the current widespread salmon declines. NMFS has concluded that threatened chinook, coho, chum, sockeye, and steelhead are at risk of extinction primarily because their populations have been reduced by human caused destruction of freshwater and estuary habitats, hydropower development, past excessive fishing harvests, hatchery practices, and other causes.

However, it should be noted that while marine mammals are not a major factor in salmon declines, they do have an impact. Thus, in 1999, NMFS issued its report to Congress entitled “Report to Congress - Impacts of California Sea Lions and Pacific Harbor Seals on Salmonids and West Coast Ecosystems.” NMFS recommended management actions requiring changes to the Marine Mammal Protection Act and two long-term research programs. One study is underway in cooperation with the Pacific States Marine Fisheries Commission, and it will supply the information needed to make a solid evaluation of the impacts that seals and sea lions are having on salmonids, human activity and other components of coastal ecosystems. To date, Congress has taken no action on NMFS’ recommendations regarding the Marine Mammal Protection Act. More information on this issue is available on NMFS’ web page at <http://www.nwr.noaa.gov/1seals/seal01.htm>.

4(D) RULE AND RELATIONSHIP TO STATE/FEDERAL PROGRAMS:

What role does Washington State’s Water Resources Inventory Area (WRIA) process play in salmon recovery? Most of the state of Washington’s 62 designated Water Resource Inventory Areas (WRIAs) are affected by one or more salmonid listings. Many local organizations and groups within these WRIAs are working together to promote salmon recovery and watershed planning. The State of Washington is currently seeking comment from NMFS on its draft ***Watershed Assessment and Planning Guidance*** document that the state hopes will eventually be approved under for Limit No. 8 (watershed conservation planning). This document and the actions engendered by the WRIA process will be important components of salmon recovery.

Will NMFS conduct local land use approvals that differ from state and local policy? NMFS does not have the authority to approve local land use plans. Local jurisdictions may seek a 4(d) rule limit by submitting their land use ordinances and codes as part of a package to qualify under limit No. 12. In reviewing the submittal, NMFS will not be approving or authorizing the ordinances or codes themselves, but will determine if the submittal meets the criteria and standards of the limit in the 4(d) rule. A development or redevelopment ordinance or plan must still comply with all other relevant state and Federal laws and permits.

How can the stormwater component in Limit No. 12 of the 4(d) rule be addressed when the final stormwater regulations in Washington haven’t been adopted? NMFS is offering input

and guidance to the Washington Department of Ecology as the state revises its stormwater regulations. In the meantime, if local jurisdictions are interested in the stormwater component of the MRCI Limit No. 12, they should begin by comparing their current standards to the stormwater consideration in Limit No. 12. Once this review is complete, jurisdictions can do the following: (1) use their existing code if it meets the MRCI standard; (2) revise their existing code to meet the standard; (3) wait for the state to finish its adoption process and use the state standards if they meet the MRCI standard; or (4) adopt new stormwater regulations that meet the MRCI standard. The 4(d) rule does not require jurisdictions to change their ordinances or practices; it simply puts in place the take prohibition.

How does the NMFS 4(d) rule relate to USFWS' 4(d) rule for Bull Trout? The geographic area covered by NMFS' 4(d) rule for 14 threatened salmon and steelhead ESUs does overlap in certain areas with the area covered by the of USFWS' 4(d) take prohibitions for Bull Trout. The NMFS rule differs from the USFWS rule in that it includes 13 programs (or criteria for future programs) for which NMFS will limit the application of the take prohibition if the requirements of the rule are met. The USFWS' rule simply prohibits take of any kind. NMFS' 4(d) limits do not extend to bull trout, and actors who are concerned about liabilities stemming from take of bull trout should contact the USFWS concerning ESA coverage.

How will the recent amendments to the Washington Department of Ecology's Shorelines Program fit with the 4(d) rule? The Department of Ecology's newly amended Shorelines Program was developed in coordination with NMFS. One of the two options available to local jurisdictions in the amended program provides incidental take coverage for the program's activities via section 7 of the ESA. Therefore, jurisdictions choosing this option will not be liable under the ESA if their shoreline ordinances are implemented according to the state Shoreline Program.

NMFS' MATRIX OF PATHWAYS AND INDICATORS:

How can the Matrix of Pathways and Indicators (MPI) be applied in non-forested situations such as agriculture or urban settings? Even though the MPI was initially developed for forestland situations, it can be used in other settings because the pathways for determining the effects of an action whether carried out in an agricultural or urban setting can be used for a broad range of actions. The MPI provides a consistent yet geographically adaptable framework for making effect determinations in many different settings. The MPI is not the only analytical model that NMFS will accept to demonstrate consistency with PFC. Other scientifically credible approaches may serve an applicant's need better.

EMERGENCY AND SAFETY ISSUES:

How can the protection of salmon habitat be balanced with protecting public infrastructure and human safety, e.g., protecting bridges by removing large wood from bridge abutments and

protecting the safety of recreational water users by removing woody debris along the edge of rivers? Certain agencies are charged with protecting public infrastructure and human safety and in some situations their safety-related actions may affect salmon habitat. NMFS recommends that if an agency knows it is likely to conduct emergency activities that may impact habitat, it should contact NMFS to determine how the actions may be modified to minimize or avoid impacts on habitat.

RECOVERY PLANNING:

What is the distinction between the 4(d) rule and recovery planning? Will recovery planning address other issues such as agricultural practices that are not currently in the 4(d) rule?

The recovery plans will set out criteria for de-listing the threatened species and describe the measures necessary to achieve those criteria. Recovery plans will thus address the entire range of factors that have caused declines in salmon populations including human activities such as agriculture. Recovery plans will relate to 4(d) rules in several ways. The technical analysis and assessment that will be included in recovery planning will provide a more specific context for future 4(d) rules or amendments, and will help the continued evaluation of existing limits. Reciprocally, NMFS believes that programs approved as 4(d) limits will provide a foundation for recovery plan measures. The essential function of 4(d) rules, however, is independent of recovery plans; that function is to prohibit take of listed species where needed. Take resulting from agricultural practices or any other human activities not covered by a 4(d) limit is prohibited by the 4(d) rules. Legal certainty that any action complies with the ESA can be attained only under ESA sections 7, 4(d), or 10.

TAKE GUIDANCE:

What about pre-existing conditions that might result in take? The 4(d) rule prohibits take without specific written authorization. There is no provision in the rule to “grandfather” pre-existing actions or conditions as exempt from the take prohibition. The rule compels all entities, businesses, and individuals to avoid take. Take liability is incurred through acts of commission and, in some circumstances, omission. It is not retroactive to actions carried out prior to the prohibition. Generally, no one is liable for pre-existing conditions which take, unless they act to maintain those conditions, or in cases of gross negligence.

FEDERALISM:

Can NMFS compel local jurisdictions to administer a federal program, i.e., the Endangered Species Act? Are local jurisdictions required to impose Federal regulations? No. The 4(d) rule applies the section 9 take prohibitions in the 14 threatened salmon and steelhead ESUs. The rule applies to all jurisdictions, businesses, and individuals within these ESUs. The rule does not prohibit actions or programs. It prohibits unauthorized take. Local jurisdictions are not required

to implement any new programs or revise their practices in response to the rule. There may, however, be ESA liabilities associated with actions that they authorize. These same ESA liabilities apply to all people and entities within the ESU.